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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

MONTANA SULPHUR & CHEMICAL COMPANY,

Petitioner,

vs.

ROBERT B. REICH, Secretary of Labor,
United States Department of Labor,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED

The question presented is:

Whether the Occupational Safety and Health Administration (OSHA), when seeking judicial enforcement of a subpoena for business records, should be required to demonstrate that its request is clearly relevant or directly related to the purpose of its investigation, or, instead, demonstrate only that its request is relevant to *any* investigation the agency is authorized by law to pursue?

PARTIES TO THE PROCEEDING

MONTANA SULPHUR & CHEMICAL COMPANY,

Petitioner

v.

ROBERT B. REICH,[1] Secretary of Labor,
United States Department of Labor,

Respondent.

---

[1] The Honorable Robert B. Reich automatically was substituted as the named party in this action pursuant to Fed. R. App. P. 43(c) when he succeeded the Honorable Lynn Martin as United States Secretary of Labor.

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Montana Sulphur & Chemical Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 32 F.3d 440 (1994). The opinions of the district court (App., *infra*, 22a-24a) and federal magistrate (App., *infra*, 25a-29a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 26, 1994 (App., *infra*, 1a). This petition for a writ of certiorari was filed within 90 days of the date of the opinion. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the scope of the Occupational Safety and Health Administration's ("OSHA") right to conduct a search of a private company's business records. The provision of the United States Constitution involved in this case is the Fourth Amendment. This amendment provides that "[t]he right of the people to be secure in

their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In addition to the Fourth Amendment, OSHA's subpoena power is limited by 29 U.S.C.A. § 657(d) (1985). This statute requires a "minimum of burden" on employers in avoidance of "[u]nnecessary duplication of efforts in obtaining information. . . ."

> Any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this chapter shall be obtained with a minimum of burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

Also at issue is the application of 29 U.S.C.A. § 654 (1985), the "general duty clause." This statute provides in relevant part:

> **Duties of employers and employees.**
>
> (a) Each employer –
>
> (1) shall furnish to each of his employees employment in a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

STATEMENT OF THE CASE

In December, 1991, the Billings, Montana office of the Occupational Safety and Health Administration ("OSHA") received a phone call from a person purporting to be an employee of Petitioner, Montana Sulphur & Chemical Company ("MSCC"). This person alleged that certain safety hazards existed at MSCC and questioned the quality of the welding being performed in some areas of the plant. The only allegation relevant to this case was a contention that MSCC did not x-ray its welds or certify its welders.

Based upon this information, OSHA's area director arranged with MSCC to inspect its plant in January, 1992. Beginning on January 15, and with full cooperation of MSCC, two OSHA officials spent five to six days at MSCC's plant. During that time, they inspected the physical plant, interviewed employees, interviewed management and inspected numerous company documents, including welding certificates of MSCC employees. The inspectors learned that MSCC welders were certified by a private company and that MSCC tested its welds using water pressure tests instead of x-rays.

After the on-site inspection, OSHA investigators requested the production of six general categories of documents solely related to welding procedures at MSCC. Because some of the requested information concerned

highly sensitive and confidential plans and specifications regarding plant modifications, MSCC requested of OSHA a specification of the welding regulations OSHA was attempting to enforce. In response, OSHA directed MSCC to Section 8(a) of the OSH Act (29 U.S.C.A. § 657(a) (1985)), 29 C.F.R. § 1926 (1992), and 29 C.F.R. § 1910 (1992) – regulations that consume over 1,000 pages and two volumes of the Code of Federal Regulations.

MSCC then asked for a copy of the complaint and a more precise reference to its regulatory authority for requesting the listed documents. OSHA failed to explain why it needed the information as well as its legal authority to request the information. Thus, MSCC did not produce the requested information.

OSHA then issued an administrative subpoena seeking a wide array of internal company documents that was no longer confined to the six discrete welding-related requests made earlier. Instead, the request had ballooned to seventeen categories of documents, including information concerning the highly sensitive and confidential plans and specifications regarding MSCC's plant.

MSCC reiterated its request for an explanation of the relationship between the documents requested and the subject of the OSHA inspection, as well as OSHA's authority to require the production of the subpoenaed information. OSHA failed to respond to these requests beyond the generalized reference to thousands of pages of administrative regulations previously supplied to MSCC. For this reason, MSCC did not produce the requested documents.

OSHA petitioned the district court for enforcement of the subpoena pursuant to 29 U.S.C.A. § 657(b) (1985). MSCC resisted the petition and sought discovery alleging that OSHA issued the subpoena as retaliation for MSCC's refusal to comply with the earlier document request. Following a one-day evidentiary hearing to resolve contested issues, the federal magistrate recommended that the district court require MSCC to comply with the subpoena and produce the requested documents. (App., *infra*, 29a). The district court adopted the magistrate's conclusions and ordered enforcement of the subpoena. (*Id.* at 24a). MSCC appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court's order of enforcement. (App., *infra*, 21a).

The court of appeals recognized that MSCC has a constitutionally protected interest in its business records, 32 F.3d at 448 (App., *infra*, 17a), and that "[d]elineating the scope of a search with some care is particularly important where employer documents are involved." *Id.* at 447 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324 n.22, 98 S.Ct. 1816, 1827 n.22, 56 L.Ed.2d 305 (1978)) (App., *infra*, 15a). The court of appeals rejected, however, MSCC's position, supported by decisions in other courts of appeal, that OSHA's subpoena must be clearly relevant to the particular conditions under investigation. *Id.* (App., *infra*, 14a-16a). Instead, the court of appeals held that when seeking to enforce a subpoena, "OSHA must only show that the documents it requests are relevant to the purpose of an authorized investigation." *Id.* (App., *infra*, 15a).

The court of appeals acknowledged that its decision conflicted with decisions from other courts of appeal, including *Donovan v. Fall River Foundry Co.*, 712 F.2d 1103 (7th Cir. 1983). In *Fall River Foundry*, the Seventh Circuit required OSHA to limit its request to documents that bear some "clear relevance to the conditions about which complaints have been received." 712 F.2d at 1111. The court of appeals rejected the *Fall River Foundry* standard because a "requirement of 'clear relevance' to the 'complaint' is neither explicit nor implicit in the statutory structure" [of OSHA's enabling legislation]. 32 F.3d at 447 (App., *infra*, 15a-16a).

Because the court of appeals' decision conflicts with decisions from other courts of appeal, and effectively negates any constitutional or statutory protection employers have against unwarranted government access to private business files, MSCC is petitioning for review of the court of appeals' decision upholding the subpoena.

REASONS FOR GRANTING THE PETITION

As the Ninth Circuit acknowledged (App., *infra*, 15a), its decision in this case conflicts with similar decisions in other circuits. *See Donovan v. Fall River Foundry Co.*, 712 F.2d 1103, 1111 (7th Cir. 1983); *Marshall v. W. & W. Steel Co.*, 604 F.2d 1322, 1327 (10th Cir. 1979). This case presents an opportunity to provide guidance to circuit courts and district courts on the applicable standard to government requests for constitutionally protected business

records. Moreover, the decision below is erroneous and the issue that it addresses is important.

ARGUMENT

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH SIMILAR DECISIONS BY THE SEVENTH AND TENTH CIRCUITS CONCERNING THE SCOPE OF GOVERNMENT SEARCHES OF BUSINESS RECORDS AND FURTHER AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE LOWER FEDERAL COURTS.

The Fourth Amendment to the United States Constitution protects the people from government intrusion into their "persons, houses, papers and effects." U.S. Const. amend. IV. This Court's prior cases have established that the Fourth Amendment's prohibition against unreasonable searches and seizures extends to administrative inspections of commercial businesses. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). In *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984), the Court described the constitutional requirements for administrative subpoenas, stating that "[w]hen an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 464 U.S. at 415 (quoting *See v. City of Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 1740, 18 L.Ed.2d

943 (1967)); *see also Barlow's*, 436 U.S. at 324 n.22 ("[d]elineating the scope of a search with some care is particularly important where documents are involved.").

Contrary to these well established principles, OSHA took the position below that it does not have to make any showing that the subpoenaed documents are related to the particular inquiry at issue (in this case welding certification and testing), "but only to any inquiry that the secretary is authorized to undertake." OSHA's Memorandum in Support of Petition to Compel, dated March 26, 1992. As support for this position, OSHA cited the general duty clause of 29 U.S.C.A. § 654(a)(1) (1985).

The court of appeals adopted OSHA's position holding that "when seeking to enforce a § 8(b) subpoena, OSHA must show only the documents it requests are relevant to the purpose of an authorized investigation." 32 F.3d at 447 (App., *infra*, 15a). In reaching this decision, the court of appeals expressly rejected decisions from the Seventh and Tenth Circuit Courts of Appeal imposing upon OSHA the duty to demonstrate that its document requests are clearly relevant or directly related to the purpose of the investigation. *Id.*

The decisions of the Seventh and Tenth Circuits recognized that the government needs more than the general duty clause and the fact that the particular employer may produce hazardous materials in order to subpoena that employer's otherwise private business records. The Seventh Circuit, relying upon this Court's decision in *Barlow's*, 436 U.S. at 324 n.22, has required OSHA to limit its requests to documents that bear some "clear relevance to

the conditions about which complaints have been received."

> *The need for appropriate specificity and limitations is greatest when the Secretary seeks documents and records of the employer.* Very few, if any reported violations would justify OSHA personnel's rummaging through the entire files of a company in order to determine what, if any, information pertinent to the employee complaints might be found. *The Secretary has an obligation to limit its inspection of documents to those that bear some clear relevance to the conditions about which the complaints have been received.*

Fall River Foundry, 712 F.2d at 1111 (emphasis added).[2] Similarly, the Tenth Circuit required a showing that the documents were "directly related to the purpose of the inspection." *W. & W. Steel Co.*, 604 F.2d at 1327.

The court of appeals rejected the *Fall River Foundry* test as neither "explicit nor implicit in the statutory structure." 32 F.3d at 447 (App., *infra*, at 15a-16a). While the court of appeals did not "countenance 'OSHA personnel's rummaging through the entire files of a company . . . " it

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[2] In *Fall River Foundry*, the Seventh Circuit noted that the Ninth Circuit had "construed language identical to that contained in the *Fall River* warrant, insofar as it pertains to an inspection of records, as being 'properly restricted.' " 712 F.2d at 1110, n.9 (citing *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 841 (9th Cir.), *cert. denied*, 459 U.S. 830 (1982); and *Donovan v. Burlington Northern, Inc.*, 694 F.2d 1213, 1216 (9th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983)). The Seventh Circuit observed that "[a]lthough it is not established by either the *Hern* or *Burlington Northern* opinion what documents were sought by the Secretary *we disagree with the Ninth Circuit's conclusion that the warrant language was specific on its face.*" *Id.* (emphasis added).

concluded that the "[b]est way to avoid this problem is to enforce those restrictions which are imposed by the Fourth Amendment and 29 U.S.C. § 657." 32 F.3rd at 447 (App., *infra*, at 16a).

The court of appeals' rejection of the *Fall River Foundry* standard effectively negates any constitutional and statutory protection employers have against unwarranted government access to private business files. This is true because virtually all businesses have potential workplace safety problems, all businesses are subject to the general duty clause, and the issue of workplace safety falls within the category of "inquir[ies] that the secretary is authorized to undertake." OSHA's Memorandum in Support of Petition to Compel, dated March 26, 1992. Thus, under the banner of the vague platitude of workplace safety, and without any further showing, the court of appeals' decision allows OSHA to *sua sponte* obtain the business records of any employer. Under this interpretation, privacy interests in business records are abolished.

The court of appeals' decision is in clear conflict with the standards imposed by other courts of appeal limiting OSHA requests to documents clearly relevant or directly related to the purpose of the investigation. This Court's certiorari jurisdiction serves to ensure uniformity in the application of the United States Constitution and United States Codes. The Court must grant the writ and review the decision of the court of appeals to secure for businesses in this country a uniform application of the Fourth Amendment and OSHA statutes to subpoenas issued for purposes of searching private company records.

B. OSHA'S SUBPOENA DID NOT REQUEST DOCUMENTS CLEARLY RELEVANT OR DIRECTLY RELATED TO THE CONDITIONS ABOUT WHICH COMPLAINTS WERE RECEIVED.

Contrary to the court of appeals' conclusion, (App., *infra*, 16a), OSHA's document requests are largely irrelevant to the issues raised by the employee complaint. As explained, OSHA ballooned its subpoena request from documents concerning the two issues under investigation (on which it already had complete information) to a wide range of issues that had no clear relevance to the employee's complaints.[3]

The record also established that OSHA was unable to point to any substantive requirements in its regulations either for x-raying or for certification of welders. OSHA's persistent attempts to obtain plans, specifications and other documents under the general duty clause is merely an attempt to bootstrap a case where none exists.

Under the Fourth Amendment and OSHA's enabling legislation, OSHA must show a clear relationship between the documents sought and the conditions under investigation. *Barlow's*, 436 U.S. at 324 n.22; *Fall River Foundry*, 712 F.2d at 1111. In *Fall River Foundry* OSHA received an employee complaint listing six specific hazards. OSHA's search warrant was substantially broader than the employee complaint. It authorized a search

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[3] It is worth noting that no previous request had been made for the expanded set of documents. It was only when MSCC balked at supplying the duplicative x-ray and certification documents that OSHA issued the subpoena and ballooned it to seventeen (17) categories of documents.

"throughout the shop" and a search of ". . . all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards." 712 F.2d at 1105.

The employer argued that the warrant failed to limit the search to those records it was required to keep in the regular course of business, and was not limited to even those records "that might be *directly pertinent* to the specific conditions as to which Fall River employees had complained." *Id.* at 1109 (emphasis added).

The Seventh Circuit agreed with the employer and modified the warrant to reach only those areas subject to employee complaints, and those records the employer was required to keep as a matter of law. *Id.* at 1112. The court explained: "The need for appropriate specificity and limitations is greatest when the Secretary seeks documents and records of the employer. [T]he Secretary has an obligation to limit its inspection of documents to those that bear some clear relevance to the conditions about which complaints have been received." *Id.* at 1111.

The absence of any clear relevance between OSHA's demands and its purported need to rummage through MSCC's records is well documented in this case. The employee complaint raised two discrete issues concerning welding. On both issues, OSHA received complete information from MSCC: regular MSCC welders were certified by a private company and MSCC did not x-ray its welds, but instead performed hydrostatic tests.

OSHA learned these facts during its rigorous six-day inspection of MSCC's plant and through the subsequent employee interviews conducted off the workplace premises. Nevertheless, OSHA expanded its document requests to include demands for the minutes of safety and health meetings for the period January 1, 1989 to the "present"; reprimands for violation of safety and health rules for the period January 1, 1990, to the "present"; all operations log books dated from January 1, 1991 to the present; all logs maintained in the maintenance foreman's office on major repairs to equipment dating from January 1, 1991 to the present; all work orders performed by all maintenance employees dating from January 1, 1991, and other demands that are not clearly relevant to the conditions about which complaints had been received.

Notwithstanding the court of appeals' conclusion otherwise, the relevance of these document requests, in the context of the employee complaint is unclear. Since day one of this dispute, MSCC requested of OSHA the specific regulations applicable to MSCC's operation as it concerns the x-rays of welds and certification of welders. OSHA, however, stonewalled on this particular issue.

At the evidentiary hearing before the magistrate, the OSHA area director conceded that his failure to advise MSCC of specific regulations was deliberate:

> Q. But until you filed that affidavit on the 26th of March, you or your employees never brought any specific OSHA provision in the CFR to the attention of Montana Sulphur which pointed to a requirement for x-rays of welds or for certification of welders, did you?

> A. I pointed – when she asked what standards we were looking at, *I deliberately tried to keep it as general as I could because I don't want to hear later on from your client that we misled them into thinking that certain sections of this don't apply.*

Trial Transcript at p. 56 (emphasis added). *Cf. Fluor Constructors v. Occupational Safety & Health Review Comm'n*, 861 F.2d 936, 941 (6th Cir. 1988) ("[a]n employer is entitled to fair notice of prohibited conduct."). It is apparent that OSHA's position was simply to use these discrete issues as a pretext to search through MSCC's files to see what information might be found – a result clearly at war with the Fourth Amendment, OSHA's enabling legislation and the federal common law. *Barlow's*, 436 U.S. at 324 n.22; *Fall River Foundry*, 712 F.2d at 1111; 29 U.S.C.A. § 657(d) (1985).

In sum, OSHA failed to demonstrate that its document requests were clearly relevant to the conditions about which employee complaints had been received. OSHA had in its possession the information and answers it requested and there were no regulations specifically applicable to the conditions under investigation. Thus, by continuing to hound MSCC with duplicative document requests, OSHA violated MSCC's Fourth Amendment rights and the statutes governing OSHA acquisition of information. *See* 29 U.S.C.A. § 657(d) (1985). For these reasons, this Court should accept jurisdiction to reverse the court of appeals' decision.

C. THE QUESTION PRESENTED IS IMPORTANT.

The Occupational Safety and Health Administration Act of 1970 was enacted to "assure so far as possible every working man and woman in the nation safe and healthful working conditions. . . . " 29 U.S.C.A. § 651(b) (1985). While OSHA sets forth an important goal of safety in the workplace, OSHA was never designed, nor could it have been, to eliminate all occupational accidents. *Titanium Metals Corp. of America v. Usery*, 579 F.2d 536, 543 (9th Cir. 1978); *Anning-Johnson Co. v. United States Occupational Safety & Health Review Comm'n*, 516 F.2d 1081, 1088 (7th Cir. 1975). Instead, it was designed to require a good faith effort to balance the need of workers to have a safe environment against the requirement of an industry to function without undue interference. *Id.* (quoting Legislative History of Occupational Safety and Health Act of 1970, Before the Subcomm. on Labor and Public Welfare, 92nd Cong., 1st Sess. (Comm. Print 1971) at 435 (statement of Senator Williams).

It is within this context that Congress authorized the Secretary of Labor to inspect and investigate allegations of unsafe working conditions. *See* 29 U.S.C.A. § 657(a) (1985). While the secretary possesses subpoena investigatory power, this power is not without limits and may not be construed to allow the secretary to violate employers' constitutionally protected privacy rights or to engage in fishing expeditions. *See* 29 U.S.C.A. § 657(d) (1985); *See v. City of Seattle*, 387 U.S. at 544 (1967).

The importance of judicial intervention in this case is well documented in light of OSHA's arbitrary and vindictive conduct. Accepting the court of appeals' decision

that OSHA can, under the guise of general investigation, rummage through an employer's files containing highly confidential and proprietary information, effectively destroys the employer's constitutionally protected privacy interests. OSHA did not in this case establish the need for the vast majority of documents requested in the subpoena. This fact, coupled with the lack of a uniform standard in this area of the law, supports a decision by this Court to grant MSCC's petition for review of the court of appeals' decision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November, 1994

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT B. REICH,* Secretary of Labor, United States Department of Labor, *Petitioner-Appellee,* v. MONTANA SULPHUR & CHEMICAL COMPANY, Respondent-Appellant.	No. 93-35076 D.C. No. CV-92-00064-JDS OPINION

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
June 7, 1994 – Seattle, Washington

Filed August 26, 1994

Before: Cecil F. Poole, Melvin Brunetti and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Poole

COUNSEL

Brian K. Gallik, James H. Goetz, Goetz, Madden & Dunn, Bozeman, Montana, for the respondent-appellant.

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* Robert B. Reich, the current Secretary of Labor, is substituted for former Secretary Lynn Martin, *See* Fed. R. App. P. 43(c)(1).

Terri P. DeLeon, Barbara Werthmann, United States Department of Labor, Washington, D.C., for the petitioner-appellee.

OPINION

POOLE, Circuit Judge:

In this appeal from a subpoena enforcement order, we revisit the boundaries limiting an administrative agency's ability to conduct preliminary investigations.

I

Montana Sulphur & Chemical Company (MSCC) is a chemical manufacturer which deals with hazardous materials, including hydrogen sulfide. On December 10, 1991, the Billings office of the Occupational Safety & Health Administration (OSHA) received a phone call from an individual purporting to be an employee of MSCC. The individual revealed a detailed knowledge of MSCC's plant and described numerous alleged health hazards. On request, the individual agreed to come to OSHA's office to sign a written complaint.

The signed complaint alleged six unsafe conditions; the only allegation relevant to this case was a contention that MSCC did not x-ray its welds or certify its welders. If true, this posed a safety hazard because improper welding could rupture and result in the release of lethally

toxic chemicals.[1] OSHA's area director reviewed the complaint and, based on the complaint and the information provided in the telephone call, determined that an inspection was warranted. OSHA arranged with MSCC to inspect its plant in January.

Two OSHA inspectors visited MSCC's plant over a five or six day period for several hours each day. During this visit, they interviewed MSCC managers and employees. They were permitted to review MSCC documents. The inspectors learned that MSCC welders were certified by a private company, Chen Northern. Employees interviewed said they could not remember having ever x-rayed welds. Supervisor Ronald Benson explained that MSCC tested its welds using water pressure tests instead.

Subsequent to this visit, OSHA sought six general categories of documents to supplement what it had learned. The request was framed in general terms, and sought documents relating to "1) Welding procedures utilized. 2) Procedures used in the qualification of welders. 3) Filler metal control procedures. 4) X-ray specifications. 5) Design specifications. 6) Piping and instrument diagrams." At this point, MSCC refused further cooperation unless OSHA provided it with a copy of the original complaint and specific citation to its regulatory authority for requesting the listed documents. MSCC also expressed concern that some of the documents covered

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[1] MSCC's plant held numerous chemicals in vessels connected by piping; its welds connected its piping to the containment vessels.

by the request were proprietary in nature. OSHA's response failed to satisfy MSCC.[2]

When further negotiations proved fruitless, OSHA consulted with its welding expert and prepared a subpoena seeking seventeen categories of documents.[3] When

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[2] The parties dispute whether OSHA ever cited to a specific regulation, 29 C.F.R. § 1910.106, or simply relied on 29 C.F.R. §§ 1910 and 1926, two very long sections of the Code. No findings of fact were made in this regard. As our decision will make clear, it does not matter whose version is correct.

[3] The subpoena demands:

> Any and all documents which reflect wholly or in part the following:
> 1) Safety and health program handbooks for the Montana Sulphur and Chemical Company;
> 2) Minutes of safety and health meetings for the period January 1, 1989 to the present;
> 3) Reprimands for violations of safety and health rules by employees of the Montana Sulphur and Chemical Company for the period January 1, 1990 to the present;
> 4) Welding procedure specifications used to qualify all welders performing work on the UOP, Hydrogenation, and Monaca units and associated piping;
> . . .
> 5) Procedure qualification records for all welders performing work on the UOP, Hydrogenation, and Monaca units and associated piping;
> 6) Quality control manual/procedures for any and all welding operations conducted on the UOP, Hydrogenation, and Monaca units and associated piping;
> 7) Filler metal control procedures used for any and all electrodes and/or any other type of filler metal used in making all welds in the UOP, Hydrogenation, and Monaca units and associated piping;

MSCC refused to produce the documents, OSHA sought court enforcement. MSCC resisted enforcement and sought discovery, alleging that OSHA was issuing the "expanded" subpoena as retaliation for MSCC refusal to

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8) Welding procedures used in making all welds in the UOP, Hydrogenation, and Monaca units and associated piping;
9) Log of all individuals performing welding in the UOP, Hydrogenation, and Monaca units and associated piping including their test dates, test methods, and any re-test dates from January 1, 1991 to the present;
10) Documentation of previous ASME certifications and use for all vessels used in the UOP, Hydrogenation, and Monaca units, including all documentation of the original design specifications including composition of vessel metals;
11) Engineering/Technical specifications used in the design of the piping systems associated with the UOP, Hydrogenation, and Monaca units;
12) Specifications and records of all Nondestructive Examinations performed on all vessels and associated piping in the UOP, Hydrogenation, and Monaca units from January 1, 1991 to the present;
13) Specifications and records of all pressure tests performed on the vessels and associated piping in the UOP, Hydrogenation, and Monaca units from January 1, 1991, to present;
14) Piping and instrument diagrams for the UOP, Hydrogenation, and Monaca units;
15) All operations log books dating from January 1, 1991 to the present;
16) All logs maintained in the maintenance foreman's office on major repairs to equipment dating from January 1, 1991 to present;
17) All work orders performed by all maintenance employees dating from January 1, 1991 to present.

comply with the earlier document request. A magistrate held a one-day evidentiary hearing to resolve contested issues and, concluding that the subpoena had been filed for a legitimate purpose, recommended enforcement and denial of MSCC's motion for further discovery. The district court adopted the magistrate's conclusions and ordered enforcement.

On appeal, MSCC raises numerous objections to the enforcement order. MSCC argues that the subpoena is unauthorized because it is both unrelated to any OSHA regulations and unrelated to the complaint that generated it. The company also contends that the subpoena violates its Fourth Amendment rights. In any event, according to MSCC, the subpoena should have been quashed because it was issued for an improper purpose.

We review de novo the district court's decision regarding enforcement of an agency subpoena. *See EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 446 (9th Cir. 1988).[4]

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[4] During the pendency of this appeal, both the district court and this court denied MSCC's motion for stays of the subpoena's enforcement. As a result, MSCC has now produced most and possibly all of the documents required by the subpoena. However, this does not render the appeal moot, because our decision will still have collateral consequences. *See EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445 (9th Cir. 1988) (subpoena appeal not moot because reversal would result in documents being returned); *Donovan v. Fall River Foundry Co.*, 712 F.2d 1103, 1111 (7th Cir. 1983) (agency warrant appeal not moot because citations arising from inspection might be challenged based on overbreadth of warrant).

II

OSHA, like most government agencies, has the power to require the production of documents through the issuance of administrative subpoenas. 29 U.S.C. § 657(b). This power is not self-enforcing; if OSHA's subpoena is resisted, it must seek judicial enforcement. *Id.* The test for whether the courts should enforce such an administrative subpoena is well-established:

> The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

EEOC v. Children's Hosp. Medical Ctr., 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc); *see Reich v. National Eng'g & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (applying same test to OSHA subpoena).

We consider in turn whether each part of this test is met.[5]

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[5] Even if the test is met, a Fourth Amendment "reasonableness" inquiry must also be satisfied. *Children's Hospital*, 719 F.2d at 1428. We address the Fourth Amendment concerns separately in § III, *infra*.-

Additionally, MSCC argues for the first time in its reply brief that OSHA should be required to prove a fourth element, that it doesn't possess the information requested. MSCC derives this requirement from IRS cases and out-of-circuit cases dealing with other agencies. *See, e.g., United States v. Powell*, 379 U.S. 48 (1964); *EEOC v. Packard Elec. Div.*, 569 F.2d 315 (5th Cir. 1978).

A

OSHA is authorized by 29 U.S.C. § 657(f), § 8(f) of the OSH Act, to conduct investigations in response to employee complaints to determine whether an alleged "violation or danger" exists. MSCC contends that this authorization does not justify the document request OSHA made.

MSCC's argument rests on two contentions regarding the appropriate scope of OSHA's authority in seeking documents. First, it argues that OSHA is limited by the presence or absence of specific regulations addressing the problem raised in the complaint. Second, it argues that OSHA is strictly limited by the scope of the complaint in response to which OSHA is investigating.

We disagree. Neither the OSH Act nor past precedent warrant constricting OSHA's authority in these ways.

1.

In MSCC's view, the pivotal fact in this case is that OSHA has no regulations regarding the x-raying of welds or the certification of welders. MSCC reasons that because no OSHA regulations govern welding, there are no regulations which MSCC could be violating, and thus

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Because the argument was not timely raised, we decline to address it. *See Officers for Justice v. Civil Serv. Comm'n* 979 F.2d 721, 726 (9th Cir. 1992) (the Ninth Circuit "ordinarily [does not] consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief.") (quotations omitted).

there was nothing for OSHA to investigate. Because OSHA could not identify any regulations which might be being violated, its investigation amounted to a fishing trip in the hopes of finding violations.

Even assuming MSCC is correct and no regulations apply, we reject this argument for two reasons. First, it reverses the investigatory process long since approved by the Supreme Court by requiring OSHA to charge first and investigate later. The power of an agency to investigate "is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). For an agency to subpoena corporate records, "[i]t is not necessary . . . that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09 (1946). *See also Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1943) (reversing district court for having insisted that Secretary of Labor establish other elements of violation before issuing subpoena); *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate.")

Second, MSCC's argument misconstrues the OSH Act as a series of unconnected stars in space, in between which no standards govern and no investigation is

proper. To the contrary, the Act consists of a general duty clause augmented in particular areas by specific regulations. The general duty clause provides "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards. . . . " 29 U.S.C. § 654(a)(1). "OSHA contemplates that the Secretary will promulgate specific safety standards to insure safe and healthful working conditions . . . The general duty clause applies when there are no specific standards." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981) (citations omitted). OSHA's regulations may amplify and augment 29 U.S.C. § 654, but they do not displace OSHA's statutory obligation to continue to enforce the general duty clause as a minimum standard.

Consequently the regulations also do not define the entire universe of OSHA's investigatory authority. To the contrary, OSHA is as entitled to conduct § 8(f) investigations of complaints alleging violations of the general duty clause as it is to investigate those alleging violation of any specific regulation. *See Reich v. Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1166-67 (7th Cir. 1994). In light of the structure of the OSH Act, we view the absence of specific regulations dealing with welding as of no special significance.

2

However, MSCC has another arrow in its quiver. As MSCC sees it, the initial employee complaint mentions

only two isolated problems:[6] no x-raying of welds, and failure to certify welders. MSCC presumes that these two precise circumstances are the only conditions OSHA was thereby authorized to investigate, and that any other investigation, even into the general adequacy of the welding, would constitute impermissible "bootstrapping" or "a fishing expedition." We decline to read OSHA's authority in such a miserly fashion.

This circuit has twice previously addressed the appropriate scope of OSHA document requests in an § 8(f) investigation in response to a complaint. In each case, the court upheld the subpoena as appropriately narrow because the documents sought related to whether the employer was "furnishing to its employees . . . a place of employment which [is] free from recognized hazards that are causing or likely to cause death or serious physical harm." *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 841 (9th Cir. 1982); *accord Donovan v. Burlington Northern Inc.*, 694 F.2d 1213, 1216 (9th Cir. 1982).[7] This is the language of 29 U.S.C. § 654(a)(1), the OSH Act's general duty clause. Thus, OSHA was not limited to seeking

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[6] As noted above, the complaint contained other allegations which OSHA declined to pursue.

[7] These two cases also addressed the related question of how circumscribed a warrant-based physical inspection must be when the inspection is the result of a complaint. In each, the court concluded that OSHA could search an area broader than that complained about because it was reasonable to believe it necessary to address the problem. *See Burlington Northern*, 694 F.2d at 1215-16; *Hern Iron Works*, 670 F.2d at 840-41. These portions of *Burlington* and *Hern* are therefore also consistent with our conclusion that OSHA's investigation is not a prisoner of the precise terms of the complaint filed.

documents about the precise complaint but was permitted to request documents which fell within its broader statutory enforcement obligations.

The governing statute and regulations compel the same conclusion. 29 U.S.C. § 657(f) authorizes investigation of the "violation *or danger*" stated by the complaint (emphasis added). Here, the danger involved was of a catastrophic release of hazardous chemicals due to improper welding. OSHA's inquiry into the adequacy of MSCC's welding was addressed to precisely this danger. Additionally, 29 C.F.R. § 1903.11(b), governing § 8(f) investigations, provides that "Inspections under this section shall not be limited to matters referred to in the complaint." Even if "inadequate welding" is not considered "referred to" in a complaint alleging two welding problems, § 1903.11(b) permits a broader investigation.

MSCC points us to an out-of-circuit EEOC case for the proposition that an agency must tailor its investigation to the precise charges before it. *See EEOC v. Packard Elec. Div.*, 569 F.2d 315 (5th Cir. 1978). However, we do not find *Packard* to be relevant, because the EEOC's subpoena statute differs significantly from that of OSHA. The EEOC's authorizing statute specifically limits its subpoenas to the investigation of discrete charges. *See EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 447 (9th Cir. 1988); *compare* 42 U.S.C. § 2000e-8(a) *with* 29 U.S.C. § 657(b).

In this case, OSHA received a complaint alleging two particular problems with MSCC's welding procedures. Under MSCC's construction of OSHA's authority, OSHA was then permitted only to investigate the two precise problems. It was not permitted to determine whether

MSCC's welding procedures were in fact adequate; it was only permitted to determine whether, if they were inadequate, they were inadequate for either of the reasons specified in the complaint.

In our view, aside from being contradicted by the governing statute and regulations, that construction makes no sense. At bottom, OSHA's mission is the assurance of safety. If an employee points out a risk of catastrophic explosion, OSHA must be allowed the opportunity to ensure that such an event does not occur. If OSHA inspects pipe welding, then leaves, and the piping explodes the next day, it will be cold comfort to know that the explosion resulted from a welding problem OSHA wasn't permitted to look for. OSHA should be allowed to examine a problem area until it can be given a clean bill of health.

This is not a case in which OSHA, presented with a complaint about welding, attempted to conduct a wall-to-wall inspection; it is a case in which OSHA, presented with a complaint about welding, attempted to determine the adequacy of MSCC's welding procedures. If OSHA is to carry out its designated mission of assuring workplace safety, it must be allowed to do at least this much.

In short, we find nothing in OSHA's authorizing statute or regulations, or in our prior precedents, that would support MSCC's constrained view of OSHA's authority. OSHA is authorized by Congress to investigate any dangers alleged by employee complaints if it determines that cause exists. 29 U.S.C. § 657(f)(1). This power is not limited to complaints alleging violations of specific regulations, nor must OSHA cite specific regulations

before it investigates. Here OSHA received a complaint alleging problems with MSCC's welding procedures, determined cause existed, and initiated an § 8(f) inquiry into the adequacy of MSCC's welding. This it was authorized to do.

B

MSCC contends further that the specific documents OSHA requested in its subpoena are not relevant to any authorized inquiry. Its primary argument in this regard is dependent on its argument regarding authority. MSCC assumes the only relevant inquiry is whether 1) MSCC did x-rays on its weld and 2) it certified it [sic] welders, and that therefore the only documents which could be relevant are those which indicate that 1) MSCC does not x-ray its welds, and 2) MSCC does certify its welders. Because we have rejected this conception of OSHA's authority, this argument fails.

We must still satisfy ourselves that OSHA's document requests meet the proper test for relevance. Without laying out a clear test, our prior cases have permitted requests which have a "bearing on" or "directly relate[]" to an employer's meeting of its general duty. *Hern Iron Works*, 670 F.2d at 841 ("bearing on"); *Burlington Northern*, 694 F.2d at 1216 ("directly related"). MSCC suggests that we should follow the Seventh Circuit, which has required OSHA to limit its requests to documents that bear some "clear relevance to the conditions about which complaints have been received." *Donovan v. Fall River Foundry Co.*, 712 F.2d 1103, 1111 (7th Cir. 1983); *see also Marshall v. W &*

W Steel Co., 604 F.2d 1322, 1327 (10th Cir. 1979) (upholding warrant requiring production of documents " 'directly related to the purpose of the inspection' ").

We are of course fully aware that "[d]elineating the scope of a search with some care is particularly important where documents are involved." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324 n.22 (1978). And while each of the above cases addressed a § 8(f) inspection of documents pursuant to a warrant, rather than the § 8(b) subpoena for documents which we face, we see no reason to apply different principles of relevance under one procedural mechanism or the other. On the other hand, OSHA should not be so narrowly trammeled that it cannot adequately assure no genuine safety risks exist.

With these considerations in mind, we hold that when seeking to enforce a § 8(b) subpoena, OSHA must show only that the documents it requests are relevant to the purpose of an authorized investigation. This standard is fully consistent with *Hern* and *Burlington Northern*, which allowed requests "bearing on" or "directly related" to OSHA's enforcement of the general duty clause. *Hern Iron Works*, 670 F.2d at 841; *Burlington Northern*, 694 F.2d at 1216. It is consistent as well with the more general standards reflected in cases like *Children's Hospital*. *Children's Hospital*, 719 F.2d at 1428 (generally, agency subpoena relevance test is whether "evidence is relevant and material to the [Congressionally-authorized] investigation.")

We do not believe the slightly narrower *Fall River Foundry* test to be warranted. A requirement of "clear relevance" to the "complaint" is neither explicit nor

implicit in the statutory structure. We do not countenance "OSHA personnel's rummaging through the entire files of a company in order to determine what, if any, information pertinent to the employee complaints might be found." *Fall River Foundry Co.*, 712 F.2d at 1111. But the best way to avoid this problem is to enforce those restrictions which are imposed by the Fourth Amendment and 29 U.S.C. § 657.

For instance, authorized complaint-based investigations are those which relate to the "violation or danger" alleged. 29 U.S.C. § 657(f)(1). This restriction on authority also limits what will be relevant. Even within the realm of what is relevant, OSHA's requests will still have to meet the "reasonableness" and "minimum burden" standards imposed by the Fourth Amendment and 29 U.S.C. § 657(d). *See infra* § III. These restrictions adequately bar enforcement of overbroad "fishing trip" subpoenas. OSHA does not have an entirely free hand.

OSHA's request easily satisfies our relevance requirement. It seeks only documents relevant to MSCC's welding practices and the danger of toxic gas leaks. Items 1-3 in the subpoena would reflect any MSCC policies designed to ensure weld and vessel safety, as well as any MSCC knowledge of possible leak problems. Items 4-9 each relate to MSCC's welding practices and welder certification practices. Items 10-14 relate to design specifications and testing patterns for the pipes and vessels used to contain MSCC's chemicals; such information would indicate what sorts of pressures welds were under and how strong they needed to be. Items 15-17 would reflect any past accidents or repairs that might signify MSCC

knowledge of a leak problem. Each is relevant to a thorough investigation of the safety of MSCC's chemical containment.

C

MSCC does not contest that OSHA followed its own procedures for seeking a subpoena. Consequently, OSHA has satisfied the three prongs of the *Children's Hospital* test for enforcement.

III

That is not the end of our inquiry, however. Even if these requirements are met, the Fourth Amendment offers additional protection to commercial privacy interests. *See New York v. Burger*, 482 U.S. 691, 699-700 (1987). However, in the context of an administrative search, the Fourth Amendment's restrictions are limited:

> [I]t is sufficient [for Fourth Amendment purposes] if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasaonble.'

United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950) (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946)); *see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) ("the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." (quoting *See*

v. City of Seattle, 387 U.S. 541, 544 (1967))). Thus, a subpoena will not be enforced if the party being investigated proves it is overbroad or unduly burdensome. *Children's Hospital*, 719 F.2d at 1428.

In addition to the Fourth Amendment, OSHA's subpoena power is limited by 29 U.S.C. § 657(d). That provision requires a "minimum burden" on employers and avoidance of "[u]nnecessary duplication":

> Any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this chapter shall be obtained with a minimum of burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

29 U.S.C. § 657(d). MSCC has not demonstrated "unnecessary duplication," nor demonstrated undue burden. This standard does not limit OSHA investigations to the allegations of the complaint, which is the focus of MSCC's argument. We have no occasion to decide upon enforcement of a subpoena not barred by the Fourth Amendment, and relevant to a legitimate investigation, but unduly burdensome or unnecessarily duplicative under § 657(d).

In the magistrate's finding, adopted by the district court, the magistrate conceded that the request was "burdensome" but concluded that it was nevertheless necessary for a complete investigation into a potentially very hazardous workplace. Unquestionably, OSHA's request imposed a burden. We do not believe that it did so unreasonably. Given the potential risk involved, OSHA

could not be expected to be satisfied with knowing that MSCC did not x-ray its welds. It was reasonable for it to inquire further into the types of tests done, the general schematics of MSCC's containment system, and MSCC's awareness of any past problems.

We also note with approval that the subpoena is highly specific in its description of the documents it seeks. Proper hazard investigation may necessarily entail more than examining a few welder certificates. To the extent that OSHA carefully tailors its document requests as to time, place, and subject matter, it satisfies its "minimum burden" obligation under § 657(d). Here, OSHA has carefully specified the precise time frames which are most relevant and the precise plant areas which are of central concern, thereby satisfying its statutory duties.

MSCC relies principally on the declaration of MSCC supervisor Ronald Benson to show the documents sought were superfluous in light of information gained from the on-site visit. However, the declaration establishes only that Benson was cooperative during OSHA's investigation with regard to x-rays and certification, the only two questions MSCC considers relevant. It does not establish that OSHA received answers in sufficient detail to other relevant questions such that requesting further documents would be unreasonable. Consequently, OSHA's subpoena did not violate MSCC's Fourth Amendment rights.

IV

MSCC argues that OSHA's subpoena should have in any event been quashed as an abuse of process because

OSHA initiated the subpoena to harass and punish MSCC. *See United States v. Powell*, 379 U.S. 48, 58 (1964). We are not persuaded.

MSCC essentially relies on two pieces of circumstantial evidence to make its case: 1) OSHA declined to identify the regulations it was seeking to enforce, and 2) OSHA submitted a 17-category subpoena after MSCC refused to comply with a six category request. The first piece of evidence creates no particular inference; OSHA is entitled to investigate to enforce the general duty clause, without prior knowledge that any specific regulations are being violated. As for the revised documents list, according to OSHA's area director, the list resulted from 1) OSHA developing a more specific list after consulting with an expert, and 2) OSHA including more documents it would eventually require to avoid the need for multiple subpoenas. The magistrate found the director's explanations credible, and MSCC has offered no evidence that they were not. Indeed, a cursory review of the two requests demonstrates the first stated reason; the subpoena's requests are far more specific and narrowly drawn. We agree with the district court's conclusion that MSCC has shown no abuse of process.

MSCC asks for more lenient treatment because it was unable to conduct discovery prior to the holding of an evidentiary hearing on OSHA's subpoena. However, "district courts must be cautious in granting such discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisitions into the practices of regulatory agencies." *SEC v. Dresser Indus.*, 628 F.2d 1368, 1388 (D.C. Cir. 1980); *accord In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991). "A limited amount

of discovery may be allowed if, for example, 'the defendant 'makes a preliminary and substantial demonstration of abuse,' that is, where the defendant has presented 'meaningful evidence' that the agency is attempting to abuse its investigative authority. Anything short of this showing is not enough.' " *Id.* (quoting *In re EEOC*, 709 F.2d 392, 400 (5th Cir. 1983)). As it was, MSCC received an evidentiary hearing, even though it could not make a "substantial preliminary demonstration." That hearing was more than MSCC was entitled to. We see no reason to measure MSCC's showing by a lower standard.[8]

V

We find the documents OSHA sought to have been relevant to a statutorily authorized purpose and defined with sufficient specificity to satisfy Fourth Amendment and statutory requirements. We find no evidence of improper motive behind OSHA's request for a subpoena. Accordingly, we affirm the district court's order of enforcement.

AFFIRMED.

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[8] Both parties have briefed the adequacy of OSHA's ability to preserve inviolate any trade secrets MSCC may be forced to disclose, but we need not address this issue. MSCC's only actual contention is that OSHA failed to establish the need for the proprietary documents requested. As discussed in § II, *supra*, the test is not of necessity but authority and relevance, and OSHA has established both of these.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

LYNN MARTIN, Secretary of Labor, United States Department of Labor,	)	Cause No. CV 92-64-BLG-RWA
Petitioner,	)	(Filed Dec. 18, 1992)
vs.	)	ORDER
MONTANA SULPHUR AND CHEMICAL COMPANY,	)	* * *
Respondent.	)	

On August 28, 1992, Magistrate Judge Richard W. Anderson issued Findings and Recommendations addressing petitioner's request that respondent be compelled to produce specified evidence and respondent's motion to compel discovery. The Magistrate Judge recommended that the District Court grant the relief sought by petitioner and deny respondent's motion to compel.

Respondent filed written objections to the Magistrate Judge's Findings and Recommendations and, pursuant to 28 U.S.C. §636(b), I have reviewed *de novo* those issues raised in respondent's written objections.

Upon a thorough review of the Magistrate Judge's Findings and Recommendations, respondent's objections and the entire record in this case, I find that the record warrants adoption of Magistrate Judge Anderson's recommendations that the relief requested by petitioner's [sic] be granted and respondent's motion be denied.

Magistrate Judge Anderson conducted a limited evidentiary hearing to examine the validity of the issuance of a subpoena duces tecum by petitioner. Upon the conclusion of this hearing, Magistrate Judge Anderson determined that the general duty clause of OSHA provides ample authority for the issuance and enforcement of the subpoena duces tecum. Respondent has not presented, nor have I found, any authority which would contradict the Magistrate Judge's conclusion.

The Magistrate Judge also found no evidence which would suggest that an improper motive behind the issuance of the subpoena duces tecum existed in this case. Once again, respondent has not presented, nor have I found, authority which would contradict the Magistrate Judge's conclusion.

The Magistrate Judge also examined the validity of respondent's assertion that a significant privacy interest in the information sought by the subpoena duces tecum exists. After reviewing this matter, the Magistrate Judge found that this concern can be dealt with through an order addressing the need to respect respondent's trade secrets. This Court adopts this finding and will issue an appropriate order.

Finally, I find that the Magistrate Judge's recommendation to deny respondent's motion to compel is warranted. Once again, respondent has not presented, nor have I found, any authority which would contradict the recommendation rendered by the Magistrate Judge.

Therefore, in accordance with the above,

IT IS ORDERED:

1. Petitioner's request that respondent be compelled to produce specified documentary evidence and testimony is granted. Petitioner is cautioned that any information received which is identified as a trade secret in respondent's business matters be protected and such information be scrupulously maintained. The Court expects strict compliance with 29 U.S.C. § 664.

2. Respondent's motion to compel discovery is denied.

The Clerk of Court is directed to forthwith notify the respective parties of the making of this order.

DONE and DATED this 18th day of December, 1992.

/s/ Jack D. Shanstrom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

LYNN MARTIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Petitioner, vs. MONTANA SULPHUR AND CHEMICAL COMPANY, Respondent.	Cause No. CV 92-64-BLG-RWA FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND ORDER (Filed Aug. 28, 1992)

This case is before the Court on petitioner's petition to compel respondent to produce documentary evidence and testimony and respondent's motion to compel discovery in this proceeding for enforcement of an administrative subpoena. For the reasons stated below, the undersigned denies respondent's motion to compel and recommends that the relief sought by petitioner be granted.

Petitioner originally filed this action to enforce an administrative subpoena duces tecum issued on February 19, 1992, during the course of an OSHA investigation. Respondent initially refused to provide the requested information and now opposes enforcement of the subpoena, asserting (1) that petitioner lacks statutory authority for the requests; (2) that the documents are sought for

vindictive reasons, and (3) that respondent has a privacy interest in nondisclosure of the information.

During the course of these proceedings, respondent noticed the depositions of certain OSHA employees. Petitioner has moved to quash the deposition subpoenas, and respondent has moved to compel the discovery.

On August 26, 1992, a limited evidentiary hearing was held for the purpose of determining whether the administrative subpoenas in question were issued for a "proper civil purpose." *United States v. Stuckey*, 646 F.2d 1369, 1374 (9th Cir. 1981). In determining whether enforcement of an administrative subpoena is appropriate, the Court must consider four factors:

> (1) [W]hether the investigation is conducted for a legitimate purpose; (2) whether the material sought is relevant to that purpose; (3) that the [petitioner] does not already possess the material sought; and (4) that the [petitioner] has complied with administrative regulations.

United States v. Author Services, Inc., 804 F.2d 1520, 1524 (9th Cir. 1986) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)). In this case, it is primarily the first and second factors that are in dispute.

At the time of hearing, pursuant to the Court's order of July 24, 1992, petitioner produced for questioning three of the OSHA employees sought to be deposed. After listening to the testimony of the witnesses, particularly the testimony of David DiTommaso, the Area Director of OSHA at Billings, and in light of the applicable standards, the undersigned recommends that the Court find that petitioner has made a prima facie showing of a

proper purpose for the subpoenas, and recommends that the administrative subpoena be enforced as requested.

Respondent's first objection to enforcement of the administrative subpoena concerns the lack of any apparent specific OSHA standard applicable to certification of welders and x-ray of welds at its plant. However, even assuming that the standards relied upon by petitioner are not applicable, as respondent contends, the lack of a specific OSHA standard is not fatal to enforcement of the petitioner's subpoena.

> "OSHA contemplates that the Secretary will promulgate specific safety standards to insure safe and healthful working conditions. [Citation omitted.] The general duty clause applies when there are not specific standards. [Citations omitted.]

Donovan v. Royal Logging Co., 645 F.2d 822, 829 (9th Cir. 1981). Thus, the general duty clause of OSHA specifically applies when, as respondent here believes, there may be no applicable standard promulgated by the Secretary. *See* 29 U.S.C. § 654(a)(1).

" '[U]nder the [general duty] clause, the Secretary must prove that (1) the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious injury." ' " *Id.* (quoting *Titanium Metals Corp. of America v. Usery*, 579 F.2d 586, 540 (9th Cir. 1978)); *see also* 29 U.S.C. §664(a)(1). "A recognized hazard 'is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standards of knowledge in the industry.' " *Id.* (quoting *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.32 (D.C. Cir.

1973)). A hazard is likely to cause death or serious injury if "evidence is presented that a practice could eventuate in serious physical harm upon other than freakish or utterly implausible concurrence of circumstances. . . . " *Id.* (quoting *National Realty,* supra, 489 F.2d at 1265 n.33)).

Testimony presented at the time of hearing demonstrated that chemicals involved at respondent's plants are highly toxic, explosive, and corrosive. There is a great and obvious danger to respondent's employees if there is a release of those chemicals as a result of improper welding. Because of the nature of the substances and activities involved, the workplace may be extremely unsafe if proper precautions are not taken. Any question regarding the adequacy of welds or welders is certainly a legitimate inquiry for OSHA in this context. While production of the documents and testimony in question may be burdensome upon respondent, the information is necessary for a thorough and complete investigation into what is potentially a very hazardous workplace. The general duty clause of OSHA clearly provides authority for the issuance and enforcement of an administrative subpoena under these circumstances.

Moreover, after hearing the testimony and arguments presented at the time of hearing, there is no "substantial question in the court's mind regarding the validity of the government's purpose. . . . " *United States v. Church of Scientology,* 520 F.2d 818, 824 (9th Cir. 1975) (quoting *United States v. Salter,* 432 F.2d 697, 700 (1st Cir. 1970)). There is simply no evidence which suggests any improper motive for the issuance of the subpoena. The respondent's second ground for opposing enforcement of the subpoena is therefore not well taken, and the Court

further finds that discovery is not appropriate in this case, since "discovery in a summary summons enforcement proceeding is the exception rather than the rule." *Id.*

Finally, the Court recognizes that respondent has a legitimate concern for the confidentiality of certain proprietary information sought by petitioner, and hereby cautions petitioner that any and all information identified by respondent as trade secret information should be protected and scrupulously maintained as such by the respondent and his representatives, including any independent experts consulted with respect to this investigation, pursuant to 29 U.S.C. § 664.

Based on the foregoing, pursuant to 28 U.S.C. § 636(b)(1)(B), the United States Magistrate Judge recommends that petitioner's petition to compel respondent to produce documentary evidence and testimony be granted, and that an order issue specifically protecting any trade secret information disclosed by respondent.

Additionally, IT IS ORDERED that respondent's motion to compel discovery is denied.

The parties may, under 28 U.S.C. § 636(b)(1), serve and file written objections within ten (10) days after receipt of a copy of this recommendation.

DONE AND DATED this 28th day of August, 1992.

/s/ Richard W. Anderson
RICHARD W. ANDERSON
UNITED STATES
MAGISTRATE JUDGE